

NO. COA14-858

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

IN THE MATTER OF:

O.J.R.,  
A Minor Child

Cumberland County  
No. 13 JT 159

Appeal by Respondent from order entered 24 March 2014 by Judge Robert J. Stiehl, III, in District Court, Cumberland County. Heard in the Court of Appeals 26 January 2015.

*The Law Offices of Martin J. Horn, PLLC, by Martin J. Horn, for Petitioner-Appellee Mother.*

*Mary McCullers Reece for Respondent-Appellant Father.*

McGEE, Chief Judge.

Because the findings of fact and conclusions of law in support of the trial court's ruling terminating Respondent's parental rights are insufficient for appellate review, we remand for further action.

*I. Facts*

Petitioner-Appellee Mother ("Petitioner") filed a petition to terminate the parental rights of Respondent-Appellant Father ("Respondent") concerning their child, O.J.R. ("the Child"), on 26 July 2013. Petitioner alleged dependency and willful

abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) & (7), as grounds for termination of Respondent's parental rights. The petition alleged Respondent had no contact with the Child and had provided no support.

The Child was born to Petitioner and Respondent in January 2009. Petitioner and Respondent were unmarried, but had been living together for approximately eight months at the time the Child was born. Petitioner testified that Respondent was in the hospital room with Petitioner when the Child was born, and that Respondent worked and helped support the Child following the birth. Approximately four months after the birth of the Child, Respondent was incarcerated due to probation violations related to several 2007 convictions. Respondent's projected release date from prison was in 2014. Before Respondent returned to prison, he signed over the title of his car to Petitioner to assist in child care expenses. Petitioner sold the car for approximately \$3,000.00. Petitioner testified that, after Respondent returned to prison, they talked on the phone and corresponded through letters. Petitioner testified she took the Child to visit Respondent, stating: "I want to say, at the most, three times[.]"

Respondent, with the assistance of a church program, sent the Child a present for Christmas in 2009. Petitioner testified that the Child received a gift from Respondent, sent by Respondent's mother, in 2010. Petitioner testified there were letters and cards from Respondent to the Child that Petitioner had thrown away when she moved residences. Petitioner testified that she intentionally withheld her address from Respondent and his family "[b]ecause I felt, at the time, it was in my child's best interest not to be subject to that."

A guardian *ad litem* was appointed for the Child, and the guardian *ad litem* signed an affidavit on 9 September 2013 concerning interviews she had conducted with Petitioner and Respondent. The guardian *ad litem's* affidavit included the following: Petitioner told the guardian *ad litem* that Respondent "got upset when she did not bring [the Child]" to visit him. Petitioner stated that she "decided the relationship was not going to work and told [Respondent]. [Petitioner] indicated [Respondent] was 'okay with it, but wanted the name of the person she would be dating if it was going to get serious so he would know who was raising his child.'" Petitioner deleted Respondent's mother from her Facebook account because Petitioner and Respondent's mother were arguing. Petitioner stated that

Respondent's mother wanted Petitioner's new address, but Petitioner refused to give it to her, telling Respondent's mother that she could send any correspondence to Petitioner's mother. Respondent told the guardian *ad litem* that Petitioner sent him a letter in late 2009 indicating that Petitioner no longer wanted Respondent in the child's life "because of his lifestyle." Respondent told the guardian *ad litem* that he did not want his parental rights terminated.

Petitioner married another man ("Petitioner's husband") in May 2010, and they had a child together in December 2011. Petitioner sent Respondent a letter in May 2012, included in the record, in which she states that the Child "is doing great in the environment she is in[,] " that Petitioner's husband gives the Child everything she needs, and that Petitioner's husband "would like to adopt [the Child] so he can legally provide [the Child] with everything [the Child] could ever need." Petitioner included in that letter an agreement, handwritten by her, for Respondent to sign agreeing to give consent for Petitioner's husband to adopt the Child. Petitioner then stated: "I will let you know that if you deny the adoption, paperwork will be filed [and] you will be served with child support orders. As of now you are behind about \$10,000." There was never any order for

child support entered against Respondent, and Petitioner testified that Respondent was never behind in child support. Respondent did not reply to the letter containing the handwritten agreement.

Respondent sent Petitioner a letter in January 2013 and included a birthday card for the Child. In that letter, Respondent stated: "I really want to be a part of [the Child's] life." Respondent indicated his desire that Petitioner would forgive him for his prior failings, and that they could be friends for the Child's sake. He indicated that he had felt shut out of the Child's life, but he believed it had more to do with Petitioner's husband than with Petitioner. Respondent asked Petitioner to respond, and that if she did not want to write him a long response, she could just write back with her phone number and he would call her at his own expense. Petitioner did not respond.

Respondent accepted service of a summons and complaint in this matter on 30 May 2013. Petitioner voluntarily dismissed the original complaint and filed a second complaint on 26 July 2013. Respondent again accepted service. Respondent sent the Child two more cards in 2013, one for Halloween and one for Thanksgiving. Included with the Halloween card was a letter to

Petitioner stating: "If you don't mind I would like it if you would write me and let me know how [the Child] is doing." Respondent wanted to know specifics about the Child's personality and how she was doing in school. Respondent concluded the letter:

I really want to be part of her life. I wish you would let me do that. If not let me in b/c I'm in here at least keep me informed on how she is plus maybe a few new pics of her would be great. All I'm asking is to please let me be in [the Child's] life. P.S. please let [the Child] get this card. Thank you.

Petitioner is the party who filed the petition for termination of Respondent's parental rights. No county department of social services was ever involved in the Child's life, and there have been no prior accusations or adjudications of neglect, dependency, or abuse. A termination hearing in this matter was begun on 10 September 2013. However, the trial court declared a mistrial at the first termination hearing. The trial court did this after reading the affidavit of the guardian *ad litem* and concluding that Petitioner had been untruthful in her testimony. The matter came on for a second termination hearing on 3 December 2013. Petitioner and Respondent testified at both hearings. Following the 3 December 2013 hearing, the trial court concluded that "grounds exist[ed] to terminate the

parental rights of the Respondent father" and that termination of Respondent's parental rights was in the Child's best interests. Respondent appeals.

## *II. Analysis*

In his two arguments on appeal, Respondent contends the trial court's findings of fact describing his lack of contact with the Child were not supported by the evidence, and that the remaining findings of fact did not support termination of his parental rights. We remand for further action by the trial court.

At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists. N.C. Gen. Stat. § 7B-1109(f) (2013); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Review in the appellate courts is limited to determining whether clear, cogent, and convincing evidence was presented to support the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000).

We are unable to adequately review the termination order because it lacks sufficient findings of fact and conclusions of

law. The trial court must make adequate findings of fact to support every necessary ultimate finding or conclusion of law:

(e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. . . .

(f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. The rules of evidence in civil cases shall apply.

N.C. Gen. Stat. § 7B-1109(e) and (f) (2013).

#### Findings of Fact

Respondent alleges that parts of the following findings of fact are not supported by the evidence. We agree in part.

4. That the Respondent Father in this case has engaged in no level of communication and effort as the father of this child. Specifically, at trial the Respondent Father attempts to blame the lack of possible address communication with the minor child. Clearly, Respondent Father's family members had open abilities to provide him with points of communication. Indeed, at one point, the Respondent Father's own brother was assigned to a duty station in Kansas in a similar locale to the duty station of the stepfather.

. . . . .

10. The [c]ourt finds by clear, cogent and convincing evidence that the statutory grounds as to neglect as it relates to the Respondent Father failing to provide support, failing to maintain contact or a relationship with the minor child by not acknowledging the minor child for holidays and birthdays, and by clearly failing to maintain regular correspondence within his means. Further, the [c]ourt has received into evidence three (3) cards, such three cards being lines of communication in writing Respondent Father to Petitioner Mother or from Respondent Father to the minor child from Father/Respondent to the Mother/Petitioner, or minor child. Specifically, 2 of the 3 measures of correspondence took place in the October/November 2013 timeframe. Both of those cards, the Respondent Father admits, were written by somebody else within the Department of Corrections and that he did not take the effort to write in his own words how he feels or what he wishes to communicate to his own daughter. The third piece of correspondence, postmarked January 24, 2013, the Respondent Father sent a birthday card to the minor child. In the birthday card, a handwritten letter is contained. In that letter the Respondent Father devotes an extraordinary amount of space discussing more with the Petitioner Mother than attempting to communicate with or receive information about the minor child. In it he admits that he "had a big part in shutting himself out of [the child's] life," and additionally "I don't think you shut me out."

Initially, the part of finding four stating that Respondent "has engaged in no level of communication and effort as the

father of this child" is not supported by the evidence. According to the trial court's own findings of fact, Respondent gave Petitioner his car, which Petitioner sold for approximately \$3,000.00. Further, the trial court acknowledged that Respondent sent some cards to the Child. The trial court made dispositional findings that Respondent sent the Child a Christmas gift in 2009, and that there was a "face-to-face" meeting with the Child early in Respondent's incarceration.

In addition, uncontroverted evidence shows that, before Respondent was incarcerated, he was living with Petitioner and the Child; he was working and taking care of the Child; he was in the delivery room when Petitioner gave birth to the Child; after Respondent was incarcerated, he sent additional letters and cards that Petitioner threw away; that Petitioner did not want Respondent to communicate with or have any relationship with the Child; that Petitioner "intentionally withheld" her contact information from Respondent and Respondent's family; and that Respondent participated in both termination hearings and testified concerning his desire to be a part of the Child's life. These facts evince some level of "communication and effort as the father of [the Child]." We are uncertain what the second sentence in finding four is meant to communicate;

however, the remainder of finding four is supported by competent evidence.

The first sentence of finding ten is an ultimate finding of fact. Evidence supports that two of the cards Respondent sent to the Child were physically written by another inmate. However, Respondent did not admit that "he did not take the effort to write in his own words how he feels or what he wishes to communicate to his own daughter." Respondent testified that the sentiments in the cards were his, but he had his friend write the cards because his friend had better penmanship.

Concerning the third piece of correspondence – the January 2013 card and letter – it is true that Respondent sent a birthday card to the Child, and a letter to Petitioner. It is also true that, in the card, Respondent is communicating directly to the Child, whereas in the letter Respondent is communicating directly to Petitioner. We do not find support for the trial court's characterization of Respondent as "devot[ing] an extraordinary amount of space to discussing more with the Petitioner Mother than attempting to communicate with or receive information about the minor child." We do not find it extraordinary that Respondent discussed "more with . . . Petitioner" in a letter to Petitioner. Though Respondent was

not attempting to communicate directly with the Child in that letter, and was not asking for information about the Child, the entire letter is devoted to trying to convince Petitioner to allow Respondent back into the Child's life, including requests that he and Petitioner try to improve their relationship for the sake of the Child. Respondent does request specific information about the Child in a subsequent letter.

There is not competent evidence to support the trial court's finding that, in the January 2013 letter, Respondent "admit[ted] that he 'had a big part in shutting himself out of [the Child's] life,' and additionally "I don't think you [Petitioner] shut me out." What Respondent actually stated in that letter was the following: "I don't think you [Petitioner] shut me out[,] I think that 'D' [Petitioner's husband] had the big part in shutting me out of [the Child's] life. Am I right?"

#### Sufficiency of the Findings and Conclusions

N.C. Gen. Stat. § 7B-1111 provides the exclusive grounds for terminating a parent's parental rights. *In re C.W.*, 182 N.C. App. 214, 218, 641 S.E.2d 725, 728-29 (2007). The trial court may only terminate a parent's parental rights if the petitioner proves at least one ground pursuant to N.C. Gen. Stat. § 7B-1111 by clear, cogent, and convincing evidence, and

the trial court enters sufficient findings of fact to support a conclusion of law that at least one of the grounds alleged by the petitioner exists. N.C. Gen. Stat. § 7B-1109(e) and (f); *In re C.W. & J.W.*, 182 N.C. App. at 219, 641 S.E.2d at 729.

In this case, the trial court has failed to properly indicate the grounds pursuant to which it terminated Respondent's parental rights, or to make sufficient findings and conclusions to support any of the potential grounds. We first note that Petitioner's petition to terminate Respondent's parental rights only included two grounds for termination: willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), and dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). Petitioner did not allege neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) as a ground for terminating Respondent's parental rights. In addition, it is not clear from the transcript that Petitioner was arguing neglect at the termination hearing.

However, because Respondent did not argue this issue on appeal, we do not decide whether there were sufficient allegations in the petition to put Respondent on notice that Petitioner might proceed on the ground of neglect as well. See *In re C.W.*, 182 N.C. App. at 228-29, 641 S.E.2d at 735 ("Because it is undisputed that DSS did not allege abandonment as a ground

for termination of parental rights, respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground.").

The termination order does not mention willful abandonment nor dependency. The order does not specifically mention N.C. Gen. Stat. § 7B-1111, though it does intimate in finding of fact ten that it is proceeding pursuant to neglect as defined in N.C. Gen. Stat. § 7B-1111(a)(1). Finding of fact ten states in relevant part:

The Court finds by clear, cogent and convincing evidence that the statutory grounds as to neglect as it relates to the Respondent Father failing to provide support, failing to maintain contact or a relationship with the minor child by not acknowledging the minor child for holidays and birthdays, and by clearly failing to maintain regular correspondence within his means.

As written, this finding does not actually state that the trial court is making an ultimate finding of neglect. However, this may simply be an issue of incomplete wording. There are no additional findings of fact referencing neglect.

The only conclusion of law relevant to N.C. Gen. Stat. § 7B-1111 was the following: "That by clear, cogent and convincing evidence grounds exist to terminate the parental rights of the

Respondent Father." This conclusion of law is insufficient to indicate the specific ground or grounds found by the trial court to terminate Respondent's parental rights, and is insufficient for appellate review.

Furthermore, in order to adjudicate based on neglect, Petitioner must prove, and the trial court must find, that the Child is a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15):

Neglected juvenile. - A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). Because there has been no prior adjudication of neglect involving Respondent, and because Respondent is incarcerated and has had no physical contact with the Child since his incarceration, the only potential grounds to prove neglect were either abandonment of the Child, or having failed to provide proper care, supervision, or discipline for the Child. There are no findings or conclusions stating that Respondent had either abandoned the Child or failed to provide proper care, supervision, or discipline. It is possible the

trial court was basing termination on abandonment, though it is unclear whether the termination was pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) or (7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation omitted). In the present case, the findings do not support a conclusion that Respondent had manifested "a willful determination to forego all parental duties and relinquish all parental claims to the child." *Id.*

Further, the order does not conclude that Respondent was neglecting the Child at the time of the hearing.

[A]n adjudication that a child was neglected on a particular prior day does not bind the trial court with regard to the issues before it at the time of a later termination hearing, i.e., the then existing best interests of the child and fitness of the parent(s) to care for it in light of all evidence of neglect and the probability of a repetition of neglect.

During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights . . . is present at that time. The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination

proceeding.

*In re Ballard*, 311 N.C. 708, 715-16, 319 S.E.2d 227, 232 (1984) (citations omitted). In some instances, neglect can be proven by demonstrating a history of neglect and further proving that the neglect is likely to continue.

In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child "at the time of the termination proceeding." . . . . Termination may not . . . be based solely on past conditions that no longer exist. Nevertheless, when, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." In those circumstances, a trial court may find that grounds for termination exist upon a showing of a "history of neglect by the parent and the probability of a repetition of neglect."

*In re L.O.K., J.K.W., T.L.W., & T.L.W.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citations omitted).

The trial court's findings of fact indicate Respondent was initially more involved in the Child's life, essentially giving Petitioner \$3,000.00 for the care of the Child, corresponding with the Child, having a visit with the Child, and giving several gifts to the Child. The trial court then found that

Respondent ceased communicating with the Child for several years, but then sent the Child a birthday card and discussed the Child in a letter to Petitioner sent in January 2013. In this letter, which was admitted at trial, Respondent indicates multiple times that he would like to be a part of the Child's life, that he hoped he and Petitioner could be "friends" for the sake of the Child, and that he didn't "see why [he couldn't] start to see [the Child] some." Respondent concluded: "I'm going to end this now. If you don't want to write a letter just send me your # and I will call you and talk about this. Plus will you please give [the Child] this b-day card for me and tell her who it's from." Respondent then requested that Petitioner "please" write him back, and he let Petitioner know that she would not have to pay for the phone call. Respondent sent this letter to Petitioner before she initiated this action for termination of Respondent's parental rights. Respondent sent a Halloween card to the Child in October 2013 and included a letter to Petitioner, again stating his desire to be in the Child's life, and asking for specific information about the Child; how she was doing in school, how she was getting along with other children, and other information. He also asked for

some recent photographs of the Child. Respondent also sent a Thanksgiving card to the Child in November 2013.

The order does not indicate that the trial court, before making its ruling, considered any changes in Respondent's behavior, particularly leading up to the time of the hearing. In addition, the order contains no finding that there was a probability of a repetition of neglect moving forward. *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231 (citation omitted) ("We agree that the parents' fitness to care for their children should be determined as of the time of the hearing. The trial court must consider evidence of changed conditions. However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect.").

We must reverse and remand. We hold that there was no evidence presented at trial that would have supported termination based upon N.C. Gen. Stat. § 7B-1111(a)(6), dependency. If Petitioner wishes to pursue this ground, a new termination hearing is required. If the trial court meant to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), willful abandonment, the trial court needs to provide both sufficient findings of fact and

conclusions of law indicating that the trial court is proceeding pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), and that Petitioner has proven that Respondent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. *Id.* Because "[t]ermination [based upon N.C. Gen. Stat. § 7B-1111(a)(1), neglect,] may not . . . be based solely on past conditions that no longer exist[,]" *In re L.O.K.*, 174 N.C. App. at 435, 621 S.E.2d at 242, if Petitioner contends that Respondent's parental rights should be terminated based upon neglect, a new termination hearing is required.

Reversed and remanded.

Judges STEELMAN and DAVIS concur.